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FAZEL BISWAS v. JAMADAR SHEIK.

Baboo *Mohit Chunder Bose* and Baboo *Amarendra Nath Chatterji* for the appellants.

Baboo *Byddi Nath Dutt* for the respondents.

The judgment of the Court (BEVERLEY and PORTER, JJ.) was as follows:—

The only point raised in this appeal is that "the Subordinate Judge has acted without jurisdiction and in contravention of the law in admitting the judgment of his predecessor into review, and in rehearing the appeal. This clearly means that the Subordinate Judge has acted in contravention of s. 624 of the Code.

Now it appears that the application for review of judgment was made, or in other words preferred, to the same Subordinate Judge who made the decree. That Subordinate Judge directed that the application should be entered on the register, and that the requisite fees for service of notice should be deposited within three days. The present case therefore seems to be precisely on all fours with that of *Karoo Sing* v. *Deo Narain Sing* (1) in which it was held than if the application for review is presented to the Judge who made the decree, and if he thereupon issues notice to the other side, the application has been "made" to him within the meaning of the section, and may be heard and disposed of by his successor in office.

We are not prepared to dissent from this view of the law, and we accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Wilson and Mr. Justice Porter.

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GOLAM RAHMAN (PLAINTIFF) *v.* FATIMA BIBI (DEFENDANT.)*

Burma Courts Act (XVII of 1875), *s.* 49—*Restitution of Conjugal Rights—Appeal from decree of Recorder of Rangoon—Civil Procedure Code (Act XIV of* 1882), *s.* 540.

The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or

* Appeal from Original Decree No. 374 of 1885, against the order and decree of W. F. Agnew, Esq, Recorder of Rangoon, dated respectively the 6th of February and 1st of April 1885.

(1) I. L. R., 10 Calc., 80.

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value capable of being estimated in money, and that that amount or value must fall within certain specified limits.

A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon.

THIS was a suit for restitution of conjugal rights. The defence was that the plaintiff had beaten and cruelly ill-treated his wife, and that her dower had not been paid.

The Recorder of Rangoon, before whom the suit was heard, dismissed the suit with costs on the 1st April 1885.

The plaintiff appealed to the High Court, valuing his appeal for the purpose of jurisdiction at Rs. 5,000, and paying a Court fee under No. 15, Sch. 2, of the Court Fees Act. He also put in an affidavit, which was uncontradicted, that he valued the appeal at that particular sum, inasmuch as his marriage expenses had amounted to Rs. 5,000.

Mr. *Amir Ali*, Mr. *Roberts* and Mr. *Gregory* for the appellant.

Mr. *O'Kinealy* for the respondent took a preliminary objection that no appeal would lie to the High Court under the Burma Courts Act, as no valuation for the purpose of jurisdiction on a suit for restitution of conjugal rights could be placed at all; and therefore the value of the suit for the purposes of jurisdiction could not be said to have exceeded Rs. 3,000, which amount would alone entitle a suitor to an appeal to the High Court under s. 49 of Act XVII of 1875.

Mr. *Amir Ali*.—The objection as to valuation is too late. It ought to have been raised before the hearing by motion to reject or remove the appeal—*Aldridge* v. *Cato* (1). [WILSON, J.—It is not an objection to valuation, but one of jurisdiction.] An objection to jurisdiction founded on valuation comes within the principle laid down by James, L. J. See also *Shire* v. *Shire* (2).

As to the main objection, it is submitted, an appeal does lie. No valuation can be put on suits in which the question of status is involved. In the case of *Shire* v. *Shire* already cited, Lord Brougham lays down the principle in distinct terms; see also *Camilleri* v. *Fleri* (3) and *D'Orliac* v. *D'Orliac* (4),

(1) L. R., 4 P. C., 313.
(2) 5 Moore's P. C., 81.
(3) 5 Moore's P. C., 161.
(4) 4 Moore's P. C., 374.

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and *Re Skinner* (1). In this latter case a suit as to the custody of a minor was held appealable to the Privy Council.

Suits of this character are not contemplated by s. 49 of the Burma Courts Act (Act XVII of 1875), and therefore the jurisdiction vested in the High Court under s. 540 of the Civil Procedure Code (Act XIV of 1882) cannot be ousted by s. 49. This section only refers to cases where the subject-matter of the suit is capable of being assessed at a money value. If the objection of the other side is well founded, the result will be that, whilst there is a right of appeal in every case over Rs. 3,000 in value, no appeal will be given in cases far more important, involving legitimacy, marriage relation, &c., merely because the subject-matter of the suits cannot be assessed at a money value. It was also contended that the affidavit of the plaintiff ought to be taken as conclusive on the question of valuation.

Mr. *O'Kinealy* in reply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

It appears to us that the objection which has been taken to this appeal must prevail.

If this Court has jurisdiction to entertain this appeal, it must be either by reason of the Burma Courts Act, or by reason of the provisions of the Civil Procedure Code, or both.

This is an appeal from a decision of the Recorder of Rangoon. And the only section in the Burma Courts Act which could be pointed to as giving an appeal to this Court is s. 49. That section says, *first*, that "there shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees." That excludes appeals altogether in cases under the sum mentioned. The section then goes on to say, that "where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees and is less than ten thousand rupees, an appeal shall lie to the High Court." These are the only words in the section and in the Act giving this Court jurisdiction to hear any appeal from the

(1) L. R., 3 P. C., 451.

Recorder's Court. And then follow excluding words: "Provided that the amount or value of the matter in dispute on appeal must exceed the former sum and be less than the latter."

It appears to us that the effect of this clause is to say that an appeal shall lie within certain limits, and that it shall not lie unless the matter falls within those limits. It therefore amounts to an express declaration that it is a condition precedent to the right of appeal that the suit shall be one which has an amount or value capable of being estimated in money, and that *that* amount or value shall fall within certain specified limits.

The section in the Civil Procedure Code which has been relied upon is s. 540. Now, that section does not deal with the jurisdiction of Courts. It deals with the rights of appeal given to parties. And in enactments of this kind the distinction must always be remembered between sections which confer jurisdiction on Courts, and sections which confer rights on parties. In order to sustain an appeal to this Court it is necessary to show two things, that the party desirous of appealing has the right to appeal, and the Court to which he would prefer the appeal has the right to entertain it.

Section 540 says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." In order to enable us under that section to hear this appeal, it must be shown that this Court is authorized to hear appeals from the Recorder's Court of Rangoon. But this Court is authorized only under s. 49 of the Burma Courts Act, that is to say, in the particular cases already referred to. And it appears to us that the words, "the Court authorized to hear appeals," in s. 540 of the Code, must mean, either the Court authorized to hear appeals from the Courts in question generally, which this Court is not authorized to do in respect of the Recorder's Court, or else the Court authorized to hear such appeals as the appeal in question, which has not been shown of our Court as to this appeal. Even if that difficulty were got over, there would remain another. It must appear that it is not expressly

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provided by any law that such an appeal as this does not lie to this Court. But, as I have already pointed out, s. 49 provides that an appeal shall not lie from the Recorder's Court to this Court unless it is capable of a money valuation, and that money valuation falls within certain limits.

The distinction between suits capable of money valuation and those not capable of such valuation is one perfectly familiar in this country. It has been embodied in Act after Act, especially in the Stamp Acts and the Court Fees' Act; and a suit of this particular nature and a great many others have been treated in them as suits incapable of valuation.

It appears to us, therefore, that neither the Burma Courts Act nor the Civil Procedure Code gives any jurisdiction to this Court.

It will be right perhaps to mention the affidavit put in by the appellant, in which he professes to place a pecuniary value on the society of his wife against whom he claims a restitution of conjugal rights. But that affidavit cannot alter the real nature and character of the suit, which is one not capable of being valued.

For these reasons we think that this appeal cannot be entertained, and must be rejected with costs.

T. A. P. *Appeal dismissed.*